

1 ROBBINS GELLER RUDMAN
2 & DOWD LLP
3 DARREN J. ROBBINS (168593)
DANIELLE S. MYERS (259916)
3 655 West Broadway, Suite 1900
San Diego, CA 92101
4 Telephone: 619/231-1058
619/231-7423 (fax)
5 darrenr@rgrdlaw.com
dmyers@rgrdlaw.com
6

7 BARRACK, RODOS & BACINE
Stephen R. Basser (121590)
Samuel M. Ward (216562)
8 600 West Broadway, Suite 900
San Diego, CA 92101
9 Telephone: 619/230-0800
619/230-1874 (fax)
10 sbasser@barrack.com
sward@barrack.com
11

12 [Proposed] Lead Counsel for Plaintiffs
13 [Additional counsel appear on signature page.]

14
15 UNITED STATES DISTRICT COURT
16
17 NORTHERN DISTRICT OF CALIFORNIA

18
19
20
21
22
23
24
25
26
27
28

ALLAN J. NICOLOW, Individually and on Behalf of All Others Similarly Situated,)	No. 3:12-cv-05980-CRB
Plaintiff,)	<u>CLASS ACTION</u>
vs.)	MEMORANDUM OF LAW IN OPPOSITION TO COMPETING MOTIONS FOR APPOINTMENT AS LEAD
HEWLETT-PACKARD COMPANY, et al.,)	PLAINTIFF
Defendants.)	DATE: March 1, 2013
)	TIME: 10:00 a.m.
	-----	CTRM: 6, 17th Floor

812097_1

1 Central States, Southeast and Southwest Areas Pension Fund (“Central States”) and the
2 Strathclyde Pension Fund (“Strathclyde”) respectfully submit this response to the competing motions
3 for appointment as lead plaintiff.

4 Three motions seeking appointment as lead plaintiff pursuant to the Private Securities
5 Litigation Reform Act of 1995 are pending before the Court.¹ “The ‘most capable’ plaintiff – and
6 hence the lead plaintiff – is the one who has the greatest financial stake in the outcome of the case,
7 so long as he meets the requirements of Rule 23.” *In re Cavanaugh*, 306 F.3d 726, 729 (9th Cir.
8 2002); 15 U.S.C. §78u-4(a)(3)(B)(iii)(I).

9 As the Ninth Circuit instructed, “the district court must compare the financial stakes of the
10 various plaintiffs and determine which one has the most to gain from the lawsuit.” *Cavanaugh*, 306
11 F.3d at 730. Courts in this District have applied a variety of metrics to ascertain which movant has
12 the largest financial interest: namely, the first-in, first-out accounting method (or “FIFO”), the last-in,
13 first-out accounting method (or “LIFO”), and/or a four-factor inquiry that variously considers
14 losses, net shares purchased, total shares purchased, and net funds expended. *See generally In re*
15 *McKesson HBOC, Inc. Sec. Litig.*, 97 F. Supp. 2d 993 (N.D. Cal. 1999) (Whyte, J.). In addition to
16 these mathematical inquiries, courts must also decide under what circumstances multiple class
17 members may combine their individual financial interests in order to claim the largest collective
18 financial interest. *See Cavanaugh*, 306 F.3d at 731 n.8 (“While a ‘group of persons’ can collectively
19 serve as a lead plaintiff, 15 U.S.C. §78u-4(a)(3)(B)(iii)(I), we are not asked to determine whether a
20 group can satisfy the ‘largest financial interest’ requirement by aggregating losses.”).

21 Here, if the Court permits the group consisting of PGGM Vermogensbeheer B.V., the State
22 of Oregon by and through the Oregon State Treasurer on behalf of the Common School Fund and,
23 together with the Oregon Public Employees Retirement Board, on behalf of the Oregon Public

¹ See Dkt. No. 28 (David Wagner); Dkt. No. 37 (HP Investor Group); Dkt. No. 38 (PGGM Group); Dkt. No. 42 (IBEW funds); Dkt. No. 49 (Central States and Strathclyde); Dkt. No. 57 (Virginia Retirement System). Mr. Wagner withdrew his motion on February 4, 2013. See Dkt. No. 68. The IBEW funds withdrew their motion on February 5, 2013. See Dkt. No. 69. The HP Investor Group filed a Statement of Non-Opposition on February 8, 2013. See Dkt. No. 70.

1 Employees Retirement Fund and Oklahoma Teachers Retirement System (collectively, the “PGGM
 2 Group”) to aggregate their individual losses to collectively claim the largest financial interest, it
 3 would appear that the group has the largest losses based upon FIFO or LIFO:

	2008-2012 Class Period		2011-2012 Class Period	
<u>Movant</u>	<u>FIFO Losses</u>	<u>LIFO Losses</u>	<u>FIFO Losses</u>	<u>LIFO Losses</u>
PGGM Group	\$118.4 million	\$84.9 million	\$60 million	\$52.5 million
Va Ret. System	\$53 million	\$39.7 million	\$43.9 million	\$33.5 million
Central States & Strathclyde	\$46.7 million	\$34.9 million	\$11 million	\$9.9 million

9 If, however, the Court determines that a movant must individually qualify for the largest
 10 financial interest without combining losses with other entities, the Virginia Retirement System or
 11 PGGM would appear to have the largest individual losses, depending on the metric selected:

	2008-2012 Class Period		2011-2012 Class Period	
<u>Movant</u>	<u>FIFO Losses</u>	<u>LIFO Losses</u>	<u>FIFO Losses</u>	<u>LIFO Losses</u>
Va Ret. System	\$53 million	\$39.7 million	\$43.9 million	\$33.5 million
PGGM	\$57.3 million	\$36.8 million	\$40.3 million	\$35.3 million
Oregon PERF	\$38.8 million	\$29.3 million	\$17.2 million	\$14.7 million
Central States	\$31 million	\$19.3 million	\$2.4 million	\$1.3 million
Oklahoma TRS	\$22 million	\$18.5 million	\$3 million	\$2.3 million
Strathclyde	\$15.5 million	\$15.5 million	\$8.5 million	\$8.5 million
Oregon Common School Fund	\$155,000	\$155,000	\$32,000	\$25,000

20 If the Court is inclined to look to net funds expended, Central States and Strathclyde fare
 21 better than the other movants in the longest period:

<u>Movant</u>	<u>Net Funds Expended</u>
Central States & Strathclyde	\$47.5 million
Va Ret. System	\$37.2 million
PGGM Group	\$17.4 million

26 By expending the most net funds in the longest class period (2008-2012), Central States and
 27 Strathclyde have “been left ‘holding the bag’ when the fraudulent inflation is revealed” – more so
 28

1 than any other movant. *McKesson*, 97 F. Supp. 2d at 996-97 (noting that of all the various metrics
 2 and factors proffered by movants, the “net funds inquiry is somewhat more helpful”).

3 Likewise, in the shorter alleged class period (2011-2012), Central States and Strathclyde held
 4 100% of the stock they purchased during the class period at the end of the class period when the
 5 truth was purportedly revealed. By contrast, the PGGM Group sold almost 70% of their stock
 6 purchased during the class period and the Virginia Retirement System sold 24%. Again, it was
 7 Central States and Strathclyde that did not profit from the fraud, but rather were “left ‘holding the
 8 bag.’” *McKesson*, 97 F. Supp. 2d at 997; *In re Network Assocs. Sec. Litig.*, 76 F. Supp. 2d 1017,
 9 1027 (N.D. Cal. 1999) (Alsup, J.).

10 In addition to their substantial financial interest in the relief sought by the class, Central
 11 States and Strathclyde “satisf[y] the requirements of Rule 23(a), in particular those of ‘typicality’
 12 and ‘adequacy.’” *Cavanaugh*, 306 F.3d at 730. As demonstrated in their motion, Central States and
 13 Strathclyde are both typical and adequate. *See* Dkt. No. 49 at 4. In this regard, Central States and
 14 Strathclyde’s claims ““arise from the same course of conduct that gives rise to the other purported
 15 class members’ claims,”” the ““claims are based on the same legal theory,”” and ““the purported class
 16 members and proposed lead plaintiff were injured by the same conduct.”” *Smajlaj v. Brocade
 17 Commc’ns Sys.*, 2006 U.S. Dist. LEXIS 97618, at *9 (N.D. Cal. 2006) (Breyer, J.) (citation omitted).
 18 In addition, Central States and Strathclyde do not have any “interests antagonistic to the proposed
 19 class” and have “retained capable counsel.” *Id.*; *see also* Dkt. No. 49 at 4-6.

20

21

22

23

24

25

26

27

28

1 While other movants may claim to possess the largest financial interest in the relief sought by
2 the class, Central States and Strathclyde possess a very significant financial interest in the relief
3 sought by the class and meet the requirements of Rule 23. If the Court determines that neither the
4 PGGM Group nor the Virginia Retirement System is the presumptive lead plaintiff, Central States
5 and Strathclyde remain ready, willing and able to serve as lead plaintiff and vigorously prosecute
6 this case on behalf of the class.

7 | DATED: February 8, 2013

Respectfully submitted,

ROBBINS GELLER RUDMAN
& DOWD LLP
DARREN J. ROBBINS
DANIELLE S. MYERS

s/ Danielle S. Myers
DANIELLE S. MYERS

655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

ROBBINS GELLER RUDMAN
& DOWD LLP
SHAWN A. WILLIAMS
Post Montgomery Center
One Montgomery Street, Suite 1800
San Francisco, CA 94104
Telephone: 415/288-4545
415/288-4534 (fax)

BARRACK, RODOS & BACINE
Stephen R. Basser
Samuel M. Ward

s/ Stephen R. Basser
STEPHEN R. BASSER

600 West Broadway, Suite 900
San Diego, CA 92101
Telephone: (619) 230-0800
Facsimile: (619) 230-1874
sbasser@barrack.com
sward@barrack.com

1 BARRACK, RODOS & BACINE
2 Daniel E. Bacine
3 Robert A. Hoffman
4 3300 Two Commerce Square
5 2001 Market Street
6 Philadelphia, PA 19103
7 Telephone: 215/963-0600
8 215/963-0838 (fax)
9 dbacine@barrack.com
10 rhoffman@barrack.com

11 [Proposed] Lead Counsel for Plaintiffs
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

2 I hereby certify that on February 8, 2013, I authorized the electronic filing of the foregoing
3 with the Clerk of the Court using the CM/ECF system which will send notification of such filing to
4 the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I
5 caused to be mailed the foregoing document or paper via the United States Postal Service to the non-
6 CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on February 8, 2013.

s/ Danielle S. Myers
DANIELLE S. MYERS

ROBBINS GELLER RUDMAN
& DOWD LLP
655 West Broadway, Suite 1900
San Diego, CA 92101-3301
Telephone: 619/231-1058
619/231-7423 (fax)

E-mail: dmyers@rgrdlaw.com

Mailing Information for a Case 3:12-cv-05980-CRB

Electronic Mail Notice List

The following are those who are currently on the list to receive e-mail notices for this case.

- **Ramzi Abadou**
rabadou@ktmc.com,knguyen@ktmc.com,arobles@ktmc.com
- **Marie Caroline Bafus**
mbafus@fenwick.com,cprocida@fenwick.com
- **Andrea Bascheri**
sammirati@bottinilaw.com
- **Stephen R. Basser**
sbasser@barrack.com,lnapoleon@barrack.com,cfessia@barrack.com
- **Francis A. Bottini , Jr**
fbottini@bottinilaw.com,sammirati@bottinilaw.com
- **Brian Danitz**
bdanitz@wsgr.com,pbaird@wsgr.com
- **John C. Dwyer**
dwyerjc@cooley.com,jkaban@cooley.com,giovannonib@cooley.com,sjoiner@cooley.com
- **Matthew Kendall Edling**
medling@cpmlegal.com,jhamilton@cpmlegal.com,obacigalupi@cpmlegal.com
- **Joseph Edward Floren**
jfloren@morganlewis.com,rluke@morganlewis.com
- **Tahir Ikeem Golden**
tgolden@fenwick.com,vpieretti@fenwick.com
- **Katherine Leigh Henderson**
khenderson@wsgr.com,abaranski@wsgr.com
- **Jeffrey Michael Kaban**
kabanjm@cooley.com,lalmanza@cooley.com
- **Kimberly Alexander Kane**
kkane@morganlewis.com,rluke@morganlewis.com
- **Reed R. Kathrein**
reed@hbsslaw.com,peterb@hbsslaw.com,pashad@hbsslaw.com,sf_filings@hbsslaw.com
- **Bryan Jacob Ketroser**
bketroser@wsgr.com
- **Laurence D. King**
lking@kaplanfox.com,amcandrew@kaplanfox.com
- **Nicole Catherine Lavallee**
nlavallee@bermandevalerio.com,ysoboleva@bermandevalerio.com

- **Kevin Peter Muck**
kmuck@fenwick.com,cprocida@fenwick.com
- **Danielle Suzanne Myers**
dmyers@rgrdlaw.com,e_file_sd@rgrdlaw.com,e_file_sf@rgrdlaw.com
- **Stephen Cassidy Neal**
nealsc@cooley.com,wilsonla@cooley.com
- **Alan R Plutzik**
aplutzik@bramsonplutzik.com,ptoovey@bramsonplutzik.com
- **Karen A. Pieslak Pohlmann**
kpohlmann@morganlewis.com
- **Darren Jay Robbins**
e_file_sd@rgrdlaw.com
- **Steven Mark Schatz**
sschatz@wsgr.com,cfoung@wsgr.com
- **Marc J. Sonnenfeld**
msonnenfeld@morganlewis.com
- **Avraham Noam Wagner**
avi@thewagnerfirm.com
- **Jeffrey Michael Walker**
jwalker@cooley.com
- **David Conrad Walton**
davew@rgrdlaw.com
- **Samuel M. Ward**
sward@barrack.com,lxlamb@barrack.com
- **Matthew S. Weiler**
mweiler@morganlewis.com,eyemoto@morganlewis.com
- **Shawn A. Williams**
shawnw@rgrdlaw.com,erinq@rgrdlaw.com,e_file_sd@rgrdlaw.com,lmix@rgrdlaw.com,e_file_sf@rgrdlaw.com

Manual Notice List

The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing). You may wish to use your mouse to select and copy this list into your word processing program in order to create notices or labels for these recipients.

- (No manual recipients)